LAW REVIEW[1] 13039

New Supreme Court Case on Federal Tort Claims Act and Medical Malpractice

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10.2—Other Supreme Court Cases
11.0—Veterans' Claims

***Levin v. United States,* 568 U.S. 503 (2013).**

Sovereign immunity of the Federal Government

Sovereign immunity or "the King can do no wrong" has been the rule in Great Britain and the United States for many centuries. This rule, which is still in effect, means that you cannot sue the sovereign (federal or state) without the sovereign's consent, but in the last century there have been many examples of state and federal sovereigns waiving immunity.

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[1]I invite the reader's attention to https://www.roa.org/page/LawCenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

The Federal Tort Claims Act

At the federal level, one major example came in 1946, when Congress enacted the Federal Tort Claims Act (FTCA).[3] The FTCA is a broad but not unlimited waiver of sovereign immunity—the statute excludes certain kinds of claims from the waiver of sovereign immunity.

Under this statute, the Federal Government can be held liable (in a non-jury trial in federal district court) for the negligent or otherwise wrongful act of a federal employee (including a member of the armed forces) in the course and scope of his or her employment, if and to the same extent that a private person would be liable, in accordance with the law of the state where the wrongful act is alleged to have taken place. One of the exclusions from the broad waiver of sovereign immunity is section 2680(h), which provides that there shall be no waiver of sovereign immunity for "any claim arising out of ... battery." 28 U.S.C. 2680(h).

When Congress enacted the FTCA in 1946, it excluded several different types of claims from the general waiver of sovereign immunity in tort. Section 2680 sets forth those exclusions as follows:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
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> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
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> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
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> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—
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> > (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
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> > (2) the interest of the claimant was not forfeited;

[3]The FTCA is codified in title 28 of the United States Code, at sections 1346(b) and 2671- 1680 [28 U.S.C. 1346(b), 2671-80].

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5),64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives."

28 U.S.C. 2680.

The *Feres* Doctrine

In 1950, just four years after Congress enacted the FTCA, the Supreme Court found an additional implied exception to the waiver of sovereign immunity. The Court held, "We conclude that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the government has been governed exclusively by federal law. We do not think that Congress, in drafting this act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Feres v. United States,* 340 U.S. 135, 146 (1950).[4]

In order to determine whether the FTCA countenanced a tort claim against the United States for the injury or death of a service member incident to service, the Supreme Court consolidated three cases from three different Courts of Appeals. In two of the cases, the intermediate appellate court had held that the FTCA barred such claims, and in the third case the intermediate court had held that the FTCA permitted such claims. This conflict among the circuits led the Supreme Court to grant *certiorari* (discretionary review).

The *Feres* case involved a barracks fire that killed Lieutenant Feres, an active duty U.S. Army Soldier. The other two cases were medical malpractice cases. Thus, it has been clear from the outset that the *Feres* Doctrine applies to medical malpractice cases, as well as any other case involving injury or death of a member of the armed forces, incident to his or her service.

The *Feres* Doctrine bars FTCA claims by active duty service members—the claim is barred if the victim was on active duty at the time of the alleged malpractice or other tort, even if the victim has since died or left active duty. Claims by military dependents and retirees, for their own injuries, are not barred by the *Feres* Doctrine.

Immunity for the individual federal tortfeasor

The tort laws of all states include the doctrine of *respondeat superior.* That means that the employer is responsible for torts committed by employees in the course and scope of their employment. This doctrine does not excuse the employee, but the injured plaintiff (especially if the damages run into the tens of thousands of dollars or more) will usually choose to sue the employer, not the individual employee. The employer will almost always be a "deeper pocket" with insurance and other assets to cover even a very serious claim, like wrongful death resulting

[4]I invite the reader's attention to Law Review 0830 (June 2008) for an in-depth discussion of *Feres* and its implications. Please see www.servicemembers-lawcenter.org. You will find 861 articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.

from a vehicle accident or medical malpractice. The FTCA applies *respondeat superior* to the Federal Government, as the employer of civilian employees and military personnel.

In the years following 1946, the plaintiff claiming property damage, personal injury, or wrongful death allegedly caused by a federal employee in the course and scope of his or her employment had a choice. The plaintiff could sue the Federal Government or could bring an action against the individual employee. Most plaintiffs chose to sue the Federal Government, which is considered the ultimate deep pocket.[5] But some plaintiffs are more interested in personal revenge than in collecting money to compensate for their losses. For various reasons, some plaintiffs chose to sue federal employees individually.

Congress became concerned about the prospect of individual federal employees (including service members) being held liable personally for torts committed in the course and scope of their employment. Starting in 1961, Congress enacted a series of statutes designed to shield precisely drawn classes of federal employees from the threat of personal liability. The first such statute was the Federal Drivers Act (FDA). Under the FDA, the FTCA is the exclusive remedy for any claim of personal injury or wrongful death arising out of a vehicle accident in which a federal employee (including a service member) was alleged to be at fault while in the course and scope of his or her employment. That law meant that federal employees did not need to purchase liability insurance to protect themselves from lawsuits alleging negligence in the operation of motor vehicles (federal vehicles, rented vehicles, or personally owned vehicles) in the course and scope of their employment.

In 1976, Congress enacted the Medical Malpractice Immunity Act (MMIA), 90 Stat. 1985. The MMIA is codified at 10 U.S.C. 1089.[6] The MMIA makes the FTCA the exclusive remedy for claims of medical malpractice allegedly committed by medical and dental personnel (military and civilian) of the armed forces and certain other federal agencies.

Congress passed several other statutes exempting certain categories of federal employees, based on agency of employment or line of work, from personal liability. Finally, in 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA), 102 Stat. 4563. The FELRTCA is an embracive statute that makes the remedy against the United States under the FTCA exclusive for torts committed by federal employees (including service members) acting within the scope of their employment. This law shields all federal employees from personal liability, regardless of their agency affiliation or line of work, but the FELRTCA did not repeal the MMIA.

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[5]Even today, with a national debt approaching $17 TRILLION, the Federal Government is unlikely to ignore or shirk a final court judgment against it.

[6]The MMIA is colloquially referred to as the "Gonzalez Act" because Representative Henry Gonzalez of Texas was the principal congressional proponent.

The *Levin* case

Steven Alan Levin is a military retiree[7] who received medical treatment, including surgery, at the U.S. Naval Hospital in Guam. Guam is a United States territory, and there is a United States District Court for Guam. This territory is most definitely part of the United States for purposes of the FTCA.

A Navy ophthalmologist performed cataract surgery on Mr. Levin at the Navy hospital in Guam, and the surgery was apparently unsuccessful, and there were complications. After filing an administrative claim with the Department of the Navy, as required by the FTCA, Mr. Levin filed suit against the United States in the United States District Court for Guam. Mr. Levin alleged two theories for liability. First, he claimed that the surgery was performed negligently—the Navy ophthalmologist did not comply with the standard of care expected of physicians under these circumstances. Second, he claimed that the surgery was a "battery" because he had (he claimed) communicated his withdrawal of consent while in the operating room in the seconds leading up to the start of the surgery.[8]

Mr. Levin acted as his own attorney in this lawsuit, and that is almost always a bad idea. Abraham Lincoln said, "A man who represents himself has a fool for a client." And the law today is so much more complicated than it was during Lincoln's lifetime.

During the discovery process, the federal district judge informed Mr. Levin that he needed an expert witness to testify about the standard of care in cataract surgery and about how the Navy ophthalmologist had departed from the standard of care. Mr. Levin failed to designate an expert witness, and the judge (in an unreported decision) granted summary judgment for the United States on both the negligence theory and the battery theory.

Mr. Levin did not appeal on the negligence theory, but he did appeal on the battery theory. His appeal was heard by the United States Court of Appeals for the Ninth Circuit.[9] The 9th Circuit affirmed the District Court. *Levin v. United States,* 663 F.3d 1059 (9th Cir. 2011).

The MMIA provides: "For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions." 10 U.S.C. 1089(e). The *Levin* case turns on the proper interpretation of this obscure clause.

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[7]Both the Supreme Court decision and the 9th Circuit decision refer to him as a "veteran." I infer that he must be a military retiree, since a veteran (a person who served in the military but left short of retirement eligibility) is not eligible for medical treatment at a military treatment facility.

[8]Mr. Levin claims that in the operating room, before the surgery began, he became concerned about the apparent state of the equipment and that he twice orally communicated his withdrawal of consent to the surgery.

[9]The 9th Circuit is the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.

Mr. Levin argued that the quoted language of section 1089(e) means that he can sue the United States for medical battery and prevail, despite the provisions of section 2680(h) of the FTCA, which excludes battery claims from the waiver of sovereign immunity. The United States argued, and the 9th Circuit agreed, that the quoted language of section 1089(e) only serves to emphasize that a suit against the individual physician is precluded, not that a suit against the United States is authorized.

In agreeing with the narrow interpretation of section 1089(e) that the United States asserted, the 9th Circuit acknowledged that it was disagreeing with the 10th Circuit, which had held that medical battery claims against the United States are authorized by section 1089(e). *Franklin v. United States,* 992 F.2d 1492 (10th Cir. 1993).[10] The 9th Circuit panel decision asserted that its sister circuit was wrong.

In our federal appellate system, the final step, after losing at the Court of Appeals level, is to apply to the Supreme Court for a writ of *certiorari* (discretionary review). Applying for *certiorari* involves filing a short brief explaining to the Court why the case is so important that it merits the attention of our nation's highest court. If four or more justices vote to hear the case, the case is then set for briefs on the merits and for oral argument. If *certiorari* is denied, which happens in the vast majority of cases, the Court of Appeals decision becomes final.

Certiorari is granted in only a small percentage of cases where it is sought, but one's chances of getting the Supreme Court to take a case improve immensely if one can show that there is a conflict among the circuits on a particular question of law. A federal statute should have the same meaning in all parts of the country. When one circuit interprets the law one way and another circuit interprets it in a conflicting way, it is likely that the Supreme Court will grant *certiorari* to resolve the conflict.

Acting as his own attorney, Mr. Levin applied to the Supreme Court for *certiorari,* and the Court granted it. The Court then appointed attorney James A. Feldman to write the brief and present the oral argument for Mr. Levin. In a 9-0 decision[11] written by Justice Ruth Bader Ginsburg, the Supreme Court reversed the 9th Circuit.

This case is not over. The Supreme Court remanded the case "for further proceedings consistent with this opinion." To prevail, Mr. Levin will need to prove his assertion that he orally withdrew his written consent to the cataract surgery.

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[10]The 10th Circuit is the federal appellate court that sits in Denver and hears appeals from district courts in Colorado, Kansas, New Mexico, Oklahoma, and Wyoming.

[11]Justice Scalia joined the decision except as to footnotes 6 and 7, which cite legislative history (a Senate committee report on the MMIA). Justice Scalia has often expressed the view that legislative history should not be relied upon or cited in determining the meaning of the words that Congress has enacted. In a recent book that he co-wrote with a prominent legal scholar, Justice Scalia and his co-author devote 21 pages to dispelling "the false notion that committee reports and floor speeches are worthwhile aids in statutory construction." *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts,* pages 369-90 (Thomson-West Publishing Co. 2012).

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ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

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